Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

Words, Inc.,
Petitioner

v.

Norman Singer; Piper Marbury Rudnick Wolfe, L.L.P.; Jackson & Campbell, P.C.; Singer and Associates, P.C., and John Craig,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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Rule 14.5 Appendix Correction Filing
December 30, 2003

QUESTIONS PRESENTED

Misusing its own appellate rules that are statutorily based upon the Federal Rules of Appellate Procedure, D.C. Code §11-743, and departing from its practice of following Federal court precedent in interpreting its appeal rules, the District of Columbia Court of Appeals has denied a civil litigant the right to appeal, despite that petitioner's filing two documents stating appeal-intent with the trial court within the time to note an appeal. The question presented is:

1. Does the action of the D.C. Court of Appeals in refusing to accept petitioner's timely-filed documents as the "functional equivalent" of a Notice of Appeal conflict with this Court's holding in *Smith v. Barry*, 502 U.S. 244 (1992), and *Houston v. Lack*, 487 U.S. 266 (1988); conflict with three decisions of the U.S. Court of Appeals for the District of Columbia Circuit interpreting F.R.A.P. 3 and 4 for invocation of jurisdiction: *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F. 2d 881 (1987); *Sinclair Broadcasting Corp. v. Federal Communications Comm.*, 284 F. 3d 148 (2002); and *Ruggierio v. Federal Communications Commission*, 278 F. 3d 1323 (2002); and conflict with the D.C. Code §11-743 adoption of F.R.A.P.?

LIST OF PARTIES AND RULE 29. 6 STATEMENT

This matter involves final action by the D.C. Court of Appeals in refusing to hear the appeal of petitioner-plaintiff Words, Inc. from an adverse ruling by the Superior Court for the District of Columbia, Bayly, J.. The present petitioner is Words, Inc., which was the plaintiff in the trial court and the appellant before the D.C. Court of Appeals. Other parties below, who will constitute the respondents before this Court, are defendants Norman Singer; Piper Marbury Rudnick & Wolfe, L.L.P (presently named Piper Rudnick, L.L.P.); Jackson & Campbell, P.C.; Singer and Associates, P.C.; and John Craig.

Petitioner Words, Inc. is a corporation organized under the laws of Virginia. There is no parent corporation and no publicly held corporation owing 10% or more of this corporation's stock. Sup. Ct. R. 29.6

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CITATIONS TO OPINIONS AND ORDERS BELOW

The opinion of the D.C. Court of Appeals granting appellees' motion to dismiss the Words, Inc. appeal, is reported *sub nom, Words, Inc. v. Singer et al.*, 810 A. 2d 910 (D.C. 2002), App. 49. The original panel of the D.C. Court of Appeals denied without explanation Words, Inc.'s motion, filed after the reported decision of that court, to invoke appeal jurisdiction through documents other than a captioned Notice of Appeal, unreported order dated February 28, 2003, App. 52. (For Sup. Ct. R. 13.5 purposes, this February 28, 2003 Order is the judgement sought to be reviewed.) Words, Inc. on March 12, 2003 filed for rehearing *en banc* of the denial of its motion to invoke appeal jurisdiction on the basis of the alternative documents, and this request for *en banc* review was denied in an Order from the D.C. Court of Appeals dated June 26, 2003. App. 53.

STATEMENT OF BASIS OF JURISDICTION

This Court's jurisdiction is founded upon its authority stated in 28 U.S.C.§2104; 28 U.S.C.§1257; and Sup. Ct. R. 13.1 to review a final civil judgment of the D.C. Court of Appeals, which is considered a state court of last resort pursuant to 28 U.S.C. §2113; 28 U.S.C. §1257(b); and Sup. Ct. R. 47.

The D.C. Court of Appeals denied petitioner Words, Inc.'s motion (to invoke appeal jurisdiction through documents other than the formal Notice of Appeal), in an unreported order dated February 28, 2003. Words, Inc. on March 12, 2003 filed for rehearing *en banc* of the denial of its motion to invoke appeal jurisdiction on the basis of the alternative documents, and this request for *en banc* review was denied in an Order from the D.C. Court of Appeals dated June 26, 2003. Words, Inc. applied for and was granted an

enlargement of time by The Chief Justice until October 24, 2003 to file its Petition for a Writ of Certiorari. Clerk's letter, Application No. 03A230, September 17, 2003. This Petition is re-submitted under Rule 14.5 after an appendix correction requested by the Clerk's letter of October 31, 2003.

STATUTES AND RULES INVOLVED IN THIS CASE

This case involves interpretation of D.C. App. Rules 3 and 4, which are set forth in the Appendix. These D.C. App. Rules are derived directly from F.R.A.P. 3 and 4, also set forth in the Appendix. This Petition also requires interpretation of D.C. Code §11-743, which states that the D.C. Court of Appeals "shall conduct its business in according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modifications of those Rules." App. 13.

STATEMENT OF THE CASE

Petitioner Words, Inc. filed a Complaint alleging legal malpractice against the respondents-defendants in the Superior Court of the District of Columbia, Civ. No. 00-5875, on August 8, 2000. On May 15, 2002, that Superior Court of the District of Columbia, Bayly, J., granted the respondents-defendants' motion for summary judgment and denied petitioner-plaintiff Words, Inc.'s motion for summary judgment. Final orders of the Superior Court of the District of Columbia can be appealed to the D.C. Court of Appeals by filing a Notice of Appeal with the trial court within 30 days. D.C. Code §11-721(a)(1); D.C. App. R. 4(a).

Within 30 days of the trial court's grant of summary judgment against it, petitioner-plaintiff Words, Inc. filed–and

served on all respondents-defendants–two documents with the Superior Court of the District of Columbia:

*May 30, 2002: Plaintiff's Rule 59(e) Motion to Alter and Amend Judgment and to Correct Summary Judgment Record Pursuant to Rule 69(a);

* May 30, 2002: Plaintiff's Rule 41(a)(1)(i) Notice of Voluntary Dismissal of First Amended Complaint Count 2 and Count 3.

Both of these May 30, 2002 filings are reproduced in App.35, 39, and stated Words, Inc.'s **intent to appeal** the trial judge's May 15, 2002 order granting summary judgment to the defendants. The Rule 41(a)(1)(i) Notice indeed stated that, App. 39:

> Owing to plaintiff's desire to appeal as a final order Judge John Bayly's May 15, 2002 grant of summary judgment for all defendants on Count 1 of the original (and First Amended) Complaint, plaintiff Words, Incorporated notes its voluntary dismissal of the First Amended Complaint . . . .

The Words, Inc. Rule 59(e) motion requested the trial judge to alter and amend the judgment "to document for the record the reasons for and nature of any apparent ex parte telephone communications by the Court . . ." to one of the attorneys for a respondent-defendant who was dismissed as a defendant in the trial court's entry of summary judgment against petitioner-plaintiff Words, Inc.. App. 35. The Words, Inc. Rule 59(e) motion also sought to have the trial judge permit amendment of the summary judgment record to include voluminous back-up documents to Fed. R. of Evid. 1006 summary financial evidence submitted as part of plaintiff's motion for summary judgment.

On September 4, 2002 (docketing date, after August 30, 2002 signature), the trial judge responded to petitioner-plaintiff's Rule 59(e) motion in an order stating that his telephone calls to the defendant's attorney were designed to expedite scheduling motions hearings and involved no discussion of any merits issue. The trial judge declined to permit supplementation of the summary judgment record with the voluminous financial documents, concluding that such transfer "of a different or expanded record to the appellate court [ought not to be allowed because it would] skew appellate review." App. 44. Petitioner-plaintiff Words, Inc. separate Rule 41(a) motion to dismiss the First Amended Complaint was assigned to another judge in Superior Court for the District of Columbia and was never subject to a signed order.

Petitioner-plaintiff had relied upon its May 30, 2003, Rule 59(e) motion to suspend the time for noting an appeal, see D.C. App. R.4 (a)(1), which states that "[t]ermination of time for filing notice of appeal" occurs when any of six post-judgment motions are filed with the trial court. Accordingly, petitioner did not file its formal Notice of Appeal with the trial court until August 27, 2002, within 30 days of the trial judge's August 30/September 4, 2002 denial of the Rule 59(e) motion but outside the 30-day time limit for appeal of the May 15, 2002 summary judgment.

The D.C. Court of Appeals dismissed Words, Inc.'s appeal because it determined that the relief requested in the Rule 59(e) motion was not sufficiently substantive or the kind available under Rule 59, and "did not subject the order to modification." *Words, Inc. v. Singer et al.*, 810 A. 2d 910, 911 (D.C. 2002).[1] This D.C. Court of Appeals' depiction of

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1. The sixth category of appeal-tolling motions set forth in D.C. App. 4(a)(2) is broad: "any other motion seeking relief

the Words, Inc. Rule 59(e) motion meant that the 30-day time to appeal the May 15, 2002 summary judgment was not terminated by the Rule 59(e) motion; Words, Inc.'s September 27, 2002 formal Notice of Appeal was thus untimely and required dismissal of the appeal. *Words, Inc. v. Singer et al.* did, however, acknowledge that: "Appellant's post-judgment motion asked only for supplementation of the record for the purpose of raising certain issues on appeal." *Words, Inc. v. Singer,* 810 A. 2d at 911.

Pursuant to D.C. Code §11-743, the D.C. Court of Appeals had promulgated its Rule 3(a)(1) by adapting the text of F.R.A.P. 3(a), and this state court has frequently looked to Federal court precedent to interpret ambiguous efforts to invoke appeal jurisdiction.[2] Petitioner Words, Inc. pressed Federal case law authority, especially that from the United States Court of Appeals for the District of Columbia Circuit, to the D.C. Court of Appeals and attempted to invoke the

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in the nature of the foregoing." This catch-all means to toll appeal time was not addressed by the D.C. Court of Appeals in *Words, Inc. v. Singer et al.* The holding in *Words, Inc. v. Singer et al.* that Words, Inc.'s Rule 59(e) motion to the trial court was not adequate to terminate and toll the appeal time, is not directly challenged in this Petition for a Writ of Certiorari.

2. For this petition, the two most salient features of D.C. App. Rules 3(a) and 4(a), and analogous F.R.A.P. 3 and 4, are that there is no particular form for a Notice of Appeal, F.R.A.P. 3(c)(4), and that a Notice of Appeal mistakenly sent to the Court of Appeals, rather than the Superior Court or the U.S. District Court, enjoys the filing date with the wrong court and is transmitted to the trial court preserving this original filing date with the incorrect court. F.R.A.P. 4(d).

jurisdiction of the D.C. Court of Appeals on the basis of the two documents filed with the trial court within 30 days of the original, May 15, 2002 summary judgment against Words, Inc.. Both the Words, Inc. Rule 59(e) motion to amend the judgment and supplement the record and the Words, Inc. Rule 41 motion to dismiss the First Amended Complaint, stated Words, Inc.'s **intent to appeal** the May 15, 2002 summary judgment, and both filings were motivated by Words, Inc.'s desire to have an adequate appeal record but one unencumbered by any pending amended complaint. See, e.g., Words, Inc's proposed order tendered to the trial judge to supplement the record for appeal. App. 38.

The D.C. Court of Appeals refused to permit its jurisdiction to be invoked by the May 30, 2002 Rule 59(e) motion or the May 30, 2002, Rule 41 motion to dismiss the First Amended Complaint. The D.C. Court of Appeals further refused to address the Federal question presented by its appeal-invocation rules being derived from F.R.A.P. 3 and 4, D.C. Code §11-743. This state court also deviated from its practice of following Federal precedent to decide controverted notice of appeal issues. See *Tuppling v. Britton*, 411 A. 2d 349, 351 (D.C. 1980). The D.C. Court of Appeals also declined to consider highly persuasive decisions–granting appeal jurisdiction in disputed notice of appeal cases–from the U.S. Court of Appeals for the D.C. Circuit.

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

A. Substantial Federal question, pressed to the state court and not decided on independent and adequate state-law grounds

District of Columbia Code §11-743 requires the D.C.

Court of Appeals to "conduct its business according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modification of those Rules." The F.R.A.P. are prescribed by this Court under it's authority set forth in 28 U.S.C. §2072. As this state court civil litigation progressed, petitioner's appeal rights necessarily came to turn on a construction of an important Federal law question. *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983), citing *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

The Federal question was pressed repeatedly by petitioner to the D.C. Court of Appeal. App. 52, 53. Refusal to grant appeal jurisdiction to petitioner Words, Inc., on the basis of that petitioner's May 30, 2002 appeal-intent documents filed with the trial court, was never justified as being compelled by some modification of the F.R.A.P. stated in the D.C. App. Rules. Where the same analysis was used–or should have been used–to decide the interwoven state and federal law questions, no independent and adequate state law grounds exists to insulate the state court decision from this Court's supervisory review. *Fitzgerald v. Racing Association*, 123 S. Ct 2156, 2159 (2003); *Pennsylvania v. Muniz*, 496 U.S. 582, 588 (1990).

B. Conflict with U.S. Court of Appeals for the District of Columbia Circuit and with this Court.

This Petition should be granted pursuant to this Court's Rule 10(b). The D.C. Court of Appeals' interpretation of its jurisdiction-invoking rules in D.C. App. Rules 3 and 4 and its refusal to hear[3] Words, Inc.'s civil appeal are in

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3. The blunt refusal of the D.C. Court of Appeals to analyze Words, Inc.'s functional equivalent bases for invoking for jurisdiction is extraordinary given D.C. Code §11-743 and

striking conflict with *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F. 2d 881, 889 (D.C. Cir. 1987), which endorsed the functional equivalency rule and held that even a F.R.A.P. 10(b) filing limited to declining a transcript, sufficiently signaled the appellant's intent to appeal to satisfy the notice requirements in F.R.A.P. 3. *Nichols* is highly instructive for petitioner Words, Inc.'s plight, because Nichols filed a premature and void Notice of Appeal but was saved by her filing the transcript declination within the appeal time limit. In *Sinclair Broadcasting Corp. v. Federal Communications Comm.*, 284 F. 3d 148, 157 (D.C. Cir. 2002), the D.C. Circuit inferred intent to appeal from the petitioner's statement of issues, despite petitioner filing a flawed F.R.A.P. Petition for Review that failed to comply with the mandatory F.R.A.P. 15(a)(2)(C) term to specify the agency order appealed from. *See also Ruggierio v. Federal Communications Comm.*, 278 F. 3d 1323, 1327 (D.C. Cir. 2002)(timely brief was "functional equivalent" of a F.R.A.P. Petition for Review and invoked appeal jurisdiction).[4]

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given that state court's acceptance of Federal authority as "persuasive" in *Tuppling v. Britton*, 411 A. 2d at 351. Moreover, prior to the District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, decisions of the D.C. Court of Appeals were subject to review by the U.S. Court of Appeals for the D.C. Circuit. D.C. Code §11-301(2).

4. See also *Brannan v. United States,* 993 F. 2d 709, 710 (9th Cir. 1993)(*pro se* letter from prisoner to court asking "to get sentence reduced" was sufficient to serve as notice of appeal); *United States v. Ward*, 696 F. 2d 1315, 1318 (11th Cir. 1983), *cert. denied,* 461 U.S. 934 (1984) (defendant's letter to District Court expressing intent to appeal and requesting appointment of attorney held sufficient to note appeal under F.R.A.P.).

Other circuits have found functional equivalents of timely notices of appeal in circumstances similar to that experienced by petitioner. See *Rinaldo v. Corbett*, 256 F. 3d 1276, 1279 (11th Cir. 2001)(motion for extension of time to appeal itself filed within appeal time and was functional equivalent of F.R.A.P. 3(a) notice of appeal). See also *Haugen v. Nassau County Dept. of Soc. Services*, 171 F. 3d 137, 138 (2d Cir. 1999), citing *Smith v. Barry*, 502 U.S. 244 (1992), and holding that even though the U.S. District Judge denied a letter-request for extension of time to file and appeal, the letter requesting the extension was filed within the appeal limit (but on the last day for noting an appeal), identified the parties and judgment appealed from, and was the functional equivalent of a notice of appeal to invoke jurisdiction, largely because the letter from the Nassau County Attorney stated that the County "will appeal" the judgment in favor of an age discrimination plaintiff. This petitioner Words, Inc.'s May 30, 2002 filings with the trial court were notably stronger statements of intent to appeal than customarily accepted by the Federal courts. Unable to point to any local modification of the F.R.A.P. jurisdiction-invoking procedures, the D.C. Court of Appeals should not have trampled on petitioner's appeal rights in a major legal malpractice case.

Certiorari should also be granted for this petitioner under this Court's Rule 10(c). This Court endowed the functional equivalency rule for disputed notices of appeal and cross-appeal in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988). A companion case, *Houston v. Lack*, 487 U.S. 266 (1988), held that under F.R.A.P. 4(a)(1), a pro se prisoner's notice of appeal was timely filed when delivered to prison authorities for forwarding to the U.S. District Court, despite arrival of the notice of appeal at the District Court outside the appeal time limit. *See also Smith v. Barry*, 502 U.S. 244,112 S. Ct. 678, 116 L.Ed. 2 678 (1992), holding that a pro se briefing form filed by a prison inmate with the U.S.

Court of Appeals for the Fourth Circuit within time for appeal, was the functional equivalent of timely Notice of Appeal and invoked appeal jurisdiction because it provided sufficient notice of appeal intent. This Court observed in *Smith v. Barry,* 502 U.S. at 248, that despite the prisoner's motivation in filing the form brief being to respond to an order from the U.S. Court of Appeals for the Fourth Circuit, the briefing form still gave notice to the adverse parties and the Court of inmate Smith's intent to appeal. In this Petition by Words, Inc., there is no question that the May 30, 2002 documents filed by Words, Inc. in the Superior Court for the District of Columbia, were served on the respondents-defendants; named all parties; and identified and gave notice of Words, Inc.'s intent to appeal the trial judge's May 15, 2002 summary judgment in favor of the respondents-defendants.

C. Congruence of D.C. App. Rules 3 and 4 with F.R.A.P. 3 and 4 for jurisdiction-invocation.

The D. C. App. Rules in their entirety are *in pari materia* with the F.R.A.P. according to D.C. Code §11-743. The D.C. App. Rules 3 and 4 and parallel Federal Rules of Appellate Procedure 3 and 4 are set forth in the Appendix and are nearly verbatim. No modification of the D.C. App. Rules as to the adequacy of a notice of appeal under F.R.A.P. 3 and 4 to invoke civil appeal jurisdiction, has been identified. Where the D.C. App. Rule and F.R.A.P. are identical, the D.C. Court of Appeals had conceded that the *pari materia* provision in D.C. Code §11-743 called for viewing Federal court interpretations of F.R.A.P. as "persuasive authority in interpreting our rules." *Tupling v. Britton*, 411 A. 2d 349, 351 (D.C. 1980). The D.C. Court of Appeals has also

acknowledged the derivation[5] of its jurisdiction-invoking rules from the F.R.A.P. 3 and 4 by citing Federal precedent interpreting the F.R.A.P. *Moore Energy Inc. v. Public Service Comm.*, 785 A. 2d 300, 305 (D.C. 2001) cited foreign state cases that in turn cited Federal precedent[6] and granted jurisdiction to a petitioner despite failure to comply with D.C. App. R. 15(a) requiring counsel to sign a corporation's Petition for Review. *See also Montgomery v. Docter, Docter, and Salus*, 578 A. 2d 176 (1990), citing Federal case law[7] and holding that absence of a filing fee and the requisite number

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5. Other state courts of last resort have derived their jurisdiction-invoking rules from F.R.A.P. 3 and 4 and applied this Court's precedents to resolve notice of appeal controversies *See, e.g., Cain v. State of Georgia,* 275 Ga. 785, 573 S.E. 2d 47 (Ga. 2000)(invocation of jurisdiction allowed because intent was clear, despite apparent untimeliness of cross-appeal); *In Re Appeal of Shantee Point Inc.*, 811 A. 2d 1253 (Vt. 2002)(functional equivalent doctrine used to deem timely a cross-appeal filed after first appellant had filed and then withdrawn an ambiguous notice of appeal); *Thigpen v. State of Alabama*, 825 So. 2d 244 (Ala. 2001)(Ala. R. App. 4(a) derived from F.R.A.P. and permitted use of *Houston v. Lack*, 487 U.S. 266 (1988), "inmate mailbox" rule to deem a prisoner's notice of appeal timely).

6. Boydston v. Strole Develop. Co., 193 AZ 247, 969 P. 2d 653, 656 (1998)(en banc), citing *K.M.A. Inc. v. General Motors Acceptance Corp.*, 652 F. 2d 398 (5th Cir. 1981)(corporation granted 30 days to enter appearance of counsel before its appeal dismissed).

7. Parissi v. Telechron, Inc., 349 U.S. 46 (1955), holding that timely notice of appeal was not rendered invalid by lack of the filing fee required by statute.

of copies of Notice of Appeal was not a jurisdictional defect. The Notice of Appeal in *Montgomery* was deemed timely even though it was initially rejected by the Clerk and not refiled with the filing fee and mandatory copies until after the 30 day appeal period expired. *See also In Re J.W.*, 763 A. 2d 1129, 1131 (D.C. 2000), citing to F.R.A.P. precedents from the Ninth and Eleventh circuits and holding that in a juvenile criminal matter, the prosecutor's failure to file a mandatory Certificate on a suppression issue, did not deprive the D.C. Court of Appeals of appeal jurisdiction because the notice of appeal was timely filed and signaled the appellant's intent to appeal.

CONCLUSION

For the foregoing reasons, this Court's Rule 10(b) and Rule 10(c) supervisory authority over application of the Federal Rules of Appellate Procedure[8] should be exercised in this case and the writ of certiorari to the District of Columbia Court of Appeals should be allowed.

Respectfully submitted,

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8. Last term, this Court allowed *certiorari* in another case raising questions of appeal-intent in a cross-appeal under F.R.A.P. 3 and 4, *Zapata Industries v. W.R. Grace & Co., cert. granted,* 123 S. Ct. 31 (2002), but *certiorari* was later denied after Sup. Ct. R. 46.1 dismissal of the case by the parties. 123 S. Ct. 551 (2002).

D.C. Code § 11-743

The District of Columbia Court of Appeals shall conduct its business according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modifications of those Rules.

D.C. Court of Appeals

Rule 3. Appeal as of right – How taken.

(a) *Filing the notice of appeal.* An appeal permitted by law as of right from the Superior Court, including an expedited appeal, shall be taken by filing a notice of appeal with the Clerk of the Superior Court within the time allowed by Rule 4. Eight copies of the notice shall be filed. Form 1 is a suggested form of a notice of appeal, but the use of a particular form shall not be required. The notice of appeal shall specify the party of parties taking the appeal and shall designate the judgment, order, or part thereof from which appeal is taken. Filing may be accomplished by mail addressed to the Clerk of the Superior Court; but filing shall not be deemed timely unless the notice is, in fact, received by that Clerk within the prescribed time. If a timely notice of appeal is filed by a party, any other party to the proceeding in the Superior Court may file a notice of appeal within the time prescribed by Rule 4. The notice of appeal shall be signed by the individual appellant or by counsel for appellant. If the appellant is a corporation or other entity, the notice shall be signed by counsel.

Rule 4. Appeal as of right – When taken.

(a) *Civil cases.* (1) Notice of appeal. A notice of appeal in a civil case shall be filed with the Clerk of the Superior Court within thirty days after entry of the judgment or order from which the appeal is taken unless a different time is specified by the provisions of the District of Columbia Code. If a timely notice of appeal is filed by a party, any other party to the proceeding in the Superior Court may file a notice of appeal within fourteen days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by

this paragraph, whichever period last expires. If a notice of appeal is submitted to this court, the clerk shall note thereon the date of receipt and transmit the notice to the Clerk of the Superior Court. The notice shall be deemed filed in the Superior Court on the date so noted.

(2) Termination of time for filing notice of appeal. The running of the time for filing a notice of appeal is terminated as to all parties by the timely filing, pursuant to the rules of the Superior Court, of any of the following motions: For judgment notwithstanding the verdict; to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; to vacate, alter or amend the order of judgment; for new trial; for reconsideration if authorized by the rules of the Superior Court; and any other motion seeking relief in the nature of the foregoing.

Rule 3. Appeal as of Right–How Taken

(a) Filing the Notice of Appeal. (1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

Rule 4. Appeal as of Right–When Taken

(a) Appeal in a Civil Case. (1) *Time for Filing a Notice of Appeal.* (A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.* (A) If a party

timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

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(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

WORDS, INCORPORATED,
Plaintiff

v.

PIPER, MARBURY, RUDNICK, WOLFE, LLP, et al.,
Defendants

Civil Action No.00-5875

MEMORANDUM OPINION AND ORDER

Before the Court are the motion of defendant, Jackson & Campbell, P.C., for summary judgment, the renewed motion of defendant, Jackson & Campbell, P.C., for summary judgment, plaintiff's opposition, the reply of defendant, and plaintiff's supplemental sworn declaration in further opposition; the motion of defendant Piper, Marbury, Rudnick & Wolfe, LLP, for summary judgment on the issue of proximate cause; the motion of defendant, Piper, Marbury, Rudnick & Wolfe, LLP, for summary judgment for plaintiff's failure to prove negligence; the motion of defendant, Norman H. Singer, for summary judgment; the supplement of defendant, Singer & Associates, P.C., to its motion, infra, for summary judgment and defendant John Craig's joinder to defendants, pending motions for summary judgment; plaintiff's opposition to defendants, various motions for summary judgment, and all defendants' consolidated reply in further support of their motions for summary judgment filed in December of 2001; the motion of defendant, Piper, Marbury, Rudnick & Wolfe, LLP, to adopt motions for summary judgment filed by co-defendants; plaintiff's motion for summary judgment, the opposition of defendants, and plaintiff's supplement to its motion for summary judgment on

collateral estoppel and 1996 compensation issues.[1]

Also before the Court are the motion of defendant John M. Craig to dismiss for lack of personal jurisdiction, plaintiff's opposition, and defendant's reply; the motion of defendant Norman H. Singer to dismiss for lack of personal jurisdiction and to. quash service of process, plaintiff's opposition, and plaintiff's supplemental exhibit in opposition; the motion of defendant Norman H. Singer to dismiss the cross-claim of defendant Jackson & Campbell, P.C., for lack of personal jurisdiction and for failure to state a claim and the opposition of defendant Jackson & Campbell, P.C.; and the motion of defendant Singer & Associates, P.C., for summary judgment, plaintiff's opposition, and defendant's reply.

In this malpractice action arising out of legal services supplied to plaintiff in the course of litigation conducted in Virginia state and federal courts during 1998 and 1999 both sides now move for entry of judgment as a matter of law in their favor.

The main contours of what happened when plaintiff's owner, Tamara Ann Dyer, and her husband, James Donald Dyer, engaged defendant Norman Singer to pursue a civil action against Xerox Corporation in connection with termination by Xerox of a distribution agreement with plaintiff are not fundamentally disputed. Rather, the parties dispute whether each of the defendants entered into a relationship with plaintiff as its attorney, and whether each of the defendants was functioning as plaintiff's attorney at the time the alleged malpractice occurred. The parties also dispute whether defendants, properly pleaded and promoted plaintiff's unsuccessful civil action and, in particular, whether defendants

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1. Following the hearing of pending motions on April 3, 2002, plaintiff submitted to the Court plaintiff's supplemental authority no. 2 on alleged Virginia law deficiency in expert Pressman's qualifications and on collateral estoppel issues. Defendants thereafter filed their motion to strike plaintiff's post-hearing submission.

may have neglected to make offensive use of collateral estoppel against Xerox in the Virginia litigation. Last, the parties quarrel about whether plaintiff has proffered such expert testimony as would be necessary to establish substandard professional performance in the Virginia litigation.[2]

Plaintiff, Words, Inc., began as a word processing service in 1973 in Alexandria, Virginia. In 1992 Words, Inc. , became a sales agent for Xerox Corporation. Until 1996 Words, Inc., and Xerox relied on an annual contract prepared by Xerox to govern their relationship during each calendar year. In 1997, however, Xerox, by letter of July 27, announced it would review its annual agency agreement with plaintiff. Ultimately, Xerox declined to renew its agreement. Deprived of its contractual arrangement with Xerox, plaintiff became insolvent and by 1998 had ended active operation.

Plaintiff now protests, principally, that Section 4.1 of the 1997 contract repudiated by Xerox provided for a year's renewal by reciting that "[for] Agents who covered substantially the same territory under a prior Xerox Authorized Sales Agent Agreement, this Agreement shall be effective as of the earlier of the date of execution or January 1, 1997," and that disputes about breach or termination of the Agreement were to be governed by New York law. Even though the United States Court of Appeals for the Fourth Circuit ultimately determined in Words, Inc. v. Xerox 205 F.3d 1336 (2000), that New York law required both plaintiff and Xerox to have signed the 1997 Agreement to make it enforceable, plaintiff contends that if defendants had advanced the preclusive precedent of McCune V. Xerox, 225 F.3d 654 (2000) a generally contemporaneous, cognate action brought in the United States

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2. Defendants John M. Craig and Norman H. Singer have also moved to dismiss the claim for lack of personal jurisdiction. Defendant Singer has likewise moved to dismiss the cross-claim of defendant Jackson & Campbell, P.C., for lack of personal jurisdiction.

District' Court for the District of West Virginia and later affirmed by the Fourth Circuit, plaintiff would have prevailed both in the trial court and on appeal.[3]

To pursue its claims against Xerox on account of Xerox's failure to renew the agency agreement', plaintiff, on February 4, 1998, engaged the professional services of defendant Singer and defendant Piper, Marbury, Rudnick & Wolfe, L.L.P.[4] On August 8, 1998, Mr. Singer who, on July 13, 1998, had left the firm of Rudnick, Wolfe, Epstein & Zeidman, see n.3, infra, instituted litigation on behalf of plaintiff and against Xerox in the Circuit Court for the City of Alexandria, Virginia.[5] On September 8, 1998, Xerox Corporation removed plaintiff's case to the United States District Court for the Eastern District of Virginia and on September 15 moved to dismiss the complaint in the removed action. At about the same time in September of 1998, defendant Singer became general counsel

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3. Plaintiff, as noted, supra, makes a variety of other arguments about the extent of defendants, malpractice and of different defendants, liability for what happened in the Virginia courts. Plaintiff also contends that its showing of what constitutes malpractice in the Eastern District of Virginia satisfies the evidentiary requirements for warding off dispositive motions challenging actions alleging deficient performance by lawyers. The substance of plaintiff's submission at this juncture, however, rests on its insistence that the vital significance of offensive collateral estopple was ignored or misapprehended by defendants and that its proffered expert would supply the necessary constituents of legal malpractice in Virginia.

4. In 1999 Mr. Singer's firm, Rudnick, Wolfe, Epstein & Zeidrnan merged with Piper & Marbury in the District of Columbia and became Piper Marbury Rudnick & Wolfe, L.L.P.

5. Earlier, on March 14, 1997, McCune v. Xerox had been brought in the federal trial court in West Virginia.

to a corporation in Bethesda, Maryland, and of counsel with defendant Jackson &: Campbell, P.C. Meanwhile, from September 22 to September 30, McCune v. Xerox, supra, was being tried in the United Sates District Court in West Virginia.

By letter of October 13 defendant Singer advised Mr. and Mrs. Dyer that he had become "Counsel to Jackson &: Campbell, P.C.," that he "would like to refer the Words case to J & C because they are better equipped to pay full time and attention to it," and that J & C will be reviewing the case to see if they are agreeable to taking it and if so, will comply with the Rudnick fee agreement, but with one exception. Somehow, some way you will have to come up with about a $10,000 retainer." Statement of material facts as to which there is no genuine dispute in support of the renewed motion for summary judgment of defendant Jackson & Campbell, P.C., exhibit 2 at 1.

On October 16, 1998, the Eastern District granted Xerox's motion and dismissed the complaint of Words, Inc. On November 6 Mr. Singer filed an amended complaint which, however, the Eastern District dismissed on January 8, 1999, with prejudice to it resubmission. Thereafter, following appellate oral argument at which Mr. Singer neglected to appear on behalf of plaintiff, the Fourth Circuit affirmed dismissal of plaintiff's complaint by the District Court. Words, Inc, v. Xerox Corp., supra. Subsequently, on August 8, 2000, plaintiff filed its complaint in this Court.

Defendant Jackson & Campbell, P.C. argues convincingly that no agreement, nor any affirmative conduct, established a professional relationship between plaintiff and Jackson & Campbell, P.C. Although Mr. Singer had been designated as "of counsel" to the firm, his status was as an independent contractor, not as a partner or employee, and Jackson Campbell reserved the right "'to accept or reject any matter referred to it." Letter of September 17, 1998, to Norman H. Singer, Esq., from James P. Schaller, President, renewed motion for summary judgment of defendant, Jackson &

Campbell, P.C., exhibit 1, ¶ 2. Plaintiff, moreover, was plainly apprised that the litigation Mr. Singer was pursuing for plaintiff would have to be reviewed for acceptance by Jackson & Campbell and would require plaintiff's supplying Jackson & Campbell with ten thousand dollars as a retainer. Letter of October 13, 1998, from Norman H. Singer to Mr. and Mrs. James Donald Dyer at 1, renewed motion for summary judgment of defendant, Jackson & Campbell, P.C., exhibit 2 at 1. Significantly, Mr. & Mrs. Dyer never paid such retainer, as Mrs. Dyer has conceded despite her uncertainty and her supposition that the issue had been somehow resolved: I really didn't know what was happening with that. I thought I -- just figured everybody has got it worked out somehow because they have forgotten about that or I never heard about it anymore and things went on and signing it for the firm; and it was, you know, about Words." Deposition of Tamara Ann Dyer of July 19, 2001, at 353-54, renewed motion, supra, exhibit 3 at 4.

Accordingly, while Mrs. Dyer may have been puzzled, no conferral of apparent authority on Mr. Singer resulted from "statements, conduct, lack of ordinary care, or other manifestations of the principal's consent whereby a third person [would be) justified in believing that the agent [was] acting within his authority." Homa v. Friendly Mobile Manor, Inc., 93 Md. 337, 363, 612 A.2d 322, 334-35 (Md. App. 1992). Mr. Singer's unmistakeable letter of October 13, 1998, to Mr. and Mrs. Dyer would have precluded any assumption of apparent authority by them, or by any reasonable recipient of Mr. Singer's letter, even if Mr. Singer had thereafter continued to use Jackson & Campbell stationery.

Finally, because Jackson & Campbell never ratified Mr. Singer's representation of plaintiff as if it were representation by the firm, and because no liability attaches to conduct by Jackson & Campbell in the absence of Jackson Campbell's acting as plaintiff's attorney, see, Needham v. Hamilton, 459 A.2d 1060, 1061 (D.C. 1983), plaintiff's causes of action against defendant Jackson & Campbell cannot survive the law

firm's dispositive motion.

Similarly, because plaintiff had severed all connection with Piper, Marbury, Rudnick & Wolfe by the time the amended complaint was filed in the Eastern District, viz., on November 6, 1998, and also by the time McCune v. Xerox, supra, was being tried, viz., during the last week of September of 1998, plaintiff cannot hold Piper, Marbury, Rudnick & Wolfe responsible in tort for its damages. Piper, Marbury, Rudnick & Wolfe concedes, of course, that plaintiff had engaged its services, along with those of Mr. Singer, on February 4, 1998. Six months later, however, on July 13, Mr. Singer concluded his professional relationship with Piper, Marbury, Rudnick & Wolfe. Not till August 8, however, did Singer initiate plaintiff's first action in the Alexandria Circuit Court. Moreover, on July 28, shortly after Mr. Singer had left Piper, Marbury, Rudnick & Wolfe, Mrs. Dyer, in a writing directed to the firm, "authorize [d] and divert [ed] the release of all [her] client files and other papers to Norman H. Singer, Esq." Memorandum in support of Piper, Marbury, Rudnick & Wolfe, L.L.P.'s motion for summary judgment -- proximate cause, exhibit B at 1. No act material or significant to this action occurred while Piper, Marbury, Rudnick & Wolfe was engaged as plaintiff's counsel: not the initiation of litigation, not the filing of the pivotal amended complaint, and not the trial in McCune v. Xerox. Even if "Mr. Singer had prepared draft motions for judgment and had investigated the case" while associated with Piper, Marbury, Rudnick & Wolfe, memorandum in support of Piper, Marbury, Rudnick & Wolfe, L.L.P.'s motion, supra, at 12, none of the acts underlying this cause of action in malpractice had occurred at such time or in such a fashion as to implicate Piper, Marbury, Rudnick & Wolfe or to render it liable to plaintiff. Action taken (or ignored) by Mr. Singer while plaintiff's state claim remained in gestation cannot, under the circumstances here alleged, fairly be deemed to be in any substantial way connected with or determinative of the outcome of plaintiff's cause of action in the Eastern District or the Fourth Circuit so

as to impose liability on Mr. Singer's firm. Nothing, in fine, has been proffered by plaintiff to establish wrongful or substandard professional conduct by Piper, Marbury, Rudnick & Wolfe. Mere representation of plaintiff by the defendant firm at a time leading up to initiation of the state litigation cannot by itself constitute malpractice as the decisional law has recognized that "[legal] malpractice is not a distinct cause of action for statute of limitations purposes, but instead depends upon the underlying acts. See, Canterbury v. Spence, 150 U.S. App. D.C. 263, 284, 464 F.2d 772, 793, cert. denied, 409 U.S. 1064, 93 S. Ct. 560, 34 L. Ed. 418 (1972) Saunders v. Nemati, 580 A.2d 660, 667 (D.C. 1990).

All defendants, furthermore, resist plaintiff's contention that "Singer should have argued that the McCune jury's conclusion that a contract was formed between McCune and Xerox based upon paragraph 4.1 precluded Xerox from denying that a contract had been formed with Words." memorandum of law in support of defendant Norman H. Singer's motion for summary judgment at 29 (footnote omitted). Plaintiff has insisted, however, that "[t]he standard of care required defendants to assert the October, 1998 McCune judgment collaterally against defendant Xerox, which would have compelled a minimum $450,000 contract and fraud damages judgment against Xerox Corp. and warranted substantial attorney's fees be paid by Xerox also." Plaintiff's point's and authorities in support of motion for summary judgment at 14. Plaintiff relies on its "expert witness on franchise-dealer litigation, Arthur Pressman, of the Philadelphia Bar," plaintiff's points and authorities, supra, at 14, and emphasizes that defendants ought to have monitored the McCune proceedings more closely as "[t]he contract formation issue in the McCune case and Words, Inc. case were exactly identical, as were the operative contract documents and regional officers of the Xerox Corporation who implemented the unlawful withdrawal of the 1997 contracts upon both McCune and Words, Inc." Plaintiff's points and authorities, supra, at 15. What defeats plaintiff's contentions, however, is that two theories

sustaining recovery in contract were presented to the jury in McCune v. Xerox, but only one verdict was returned on that claim. Because the McCune jury's determination does not reveal whether the jury found for McCune on the basis of his partial performance or on the basis of the Xerox contract's requiring only McCune's signature, see plaintiff's statement of material facts not in genuine dispute, exhibit 3, the McCune verdict cannot be urged by plaintiff as constituting collateral estoppel. Regardless of whether the Eastern District and Fourth Circuit would have applied federal law or state law be it Virginia's or New York's -- to determine application of the doctrine of collateral estoppel (and the role of mutuality), the doctrine would here have had no application as "the issue sought to be precluded must have actually been determined in the prior proceeding." Sedlack v. Braswell Services Group, Inc., 12 134 F. 3d 219, 224 (4 th Cir. 1998). "Given the jury's general verdict in the [earlier] case, it is impossible to discern whether the damages awarded were based on the [partial performance] theory or on breach of contract arising from [the sufficiency of plaintiff's signature alone]. Because of the existence of alternative bases of liability, it cannot be shown that [either theory of liability] was necessary and essential to the judgment." C.B. Marchant Co., Inc. v. Eastern Foods, Inc., 756 F.2d 317, 319 (4th Cir. 1985).[6] See also Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).[7]

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6. Plaintiff's expert, moreover, appears to concede that no exegesis of the McCune verdict can reveal the basis of the jury's decision favoring plaintiff. See memorandum of law in support of defendant Norman H. Singer's motion for summary judgment at 29-30.

7. Plaintiff's recourse to Nimetz v. Cappadona, 596 A.2d 603 (D.C. 1991) is unavailing as that case, which addressed the obligation of a losing defendant to identify by special verdict a factually unsupported verdict when appealing from a general verdict properly supported by fact under another

More generally, plaintiff has supplied no expert evidence to demonstrate that in any challenged respect defendants breached the standard of care required to be observed by attorneys practicing in Virginia.[8] To establish legal malpractice plaintiff would have to introduce expert testimony about what standard of care a lawyer should have observed and what effect a lawyer's failure to meet such standard had on causing a client's loss. E.g., Lyle, Siecrel, Croshaw & Beale, P.C.V. Tidewater Capital Corp., 249 Va. 426, 433, 457 S.E. 2d 28, 33 (1995); Heyward & Lee Construction Co., Inc. v. Sands, Anderson, Marks & Nutter, 249 Va. 54, 57, 533 S.E. 2d 270, 272 (1995). Although plaintiff has alleged an array of violations of the standard of care by defendants, and has, in deposition testimony taken from its expert, identified approximately ten instances of breach, plaintiff's designated expert has not been shown to be qualified to express an expert's opinion about why the ten cited instances constitute

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theory of recovery, is simply not here ad rem. The reach and purpose of Nimetz v. Cappadona, supra, do not extend to issues of estoppel raised in this litigation

8. The Court has considered the four recognized factors which determine governmental interest in this dispute and has concluded that Virginia law ought here to be applied. E.Q., District of Columbia v. Coleman, 667 A.2d 811, 816 (D.C. 1995). The events, including the claimed injuries, all occurred in Virginia, complaint, IT I and'2, and passim, the futile litigation which assertedly caused plaintiff's losses took place in Virginia state and federal courts, complaint, IT 15-20, 24, 30-31, 33-35, 37, 39-41, 50, plaintiff is a Virginia corporation with its principal place of business in Alexandria, Virginia, complaint, 1 1, and the professional relationship here in issue was centered as much, if not more, in the state and federal courts in Virginia, than at defendants, law offices in Maryland and the District of Columbia, or in the proceedings in the United States District Court in West Virginia.

malpractice as revealing breach of a Virginia lawyer's obligations to his client. In addition, most of the cited instances are otherwise not viable.

Defendants have convincingly explained why, in light of Bly v. Rhoads, 210 Va. 645, 222 S.E. 2d 783 (1976) and Virginia Code § 8.01-581.2, the standard for legal malpractice in Virginia ought to be deemed to be the same standard as that applied in medical malpractice actions. Memorandum in support of defendant Piper, Marbury, Rudnick & Wolfe, LLP's motion for summary judgment for failure to prove negligence at 2-7. Accordingly, because in legal malpractice actions "the standard of care by which the acts or omissions are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth [of Virginia]" Virginia Code § 8.01-581.2, the same localized standard must here apply. While plaintiff's expert appears to have acquired considerable forensic experience and acceptance elsewhere, he cannot be received as an expert in the practice of law in Virginia. Mr. Pressman, first of all, has not been admitted to membership in the Virginia bar. He is, moreover, unfamiliar with the standard of care applicable to trial lawyers in Alexandria, Virginia. Nor does Mr. Pressman know about Virginia statutory provisions for filing motions for judgment. He has, besides, conducted no research on the Virginia standard of care respecting the investigation of prospective litigation for clients. Mr. Pressman has appeared in Virginia courts but twice in his career. One occasion was very long ago and then, as well as later, Mr. Pressman was accompanied by local counsel. Deposition of Arthur L. Pressman of October 14, 2001 at 25-26. Mr. Pressman, could not, accordingly, be accepted as an expert for plaintiff as he could not render an opinion as to what standard of care is required in Virginia. Deprived of a necessary underpinning, plaintiff's tort action against the defendants cannot stand.[9] E.g., Musa v. Continental Insurance

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9. Summary judgment is properly entered "after adequate time for discovery and upon motion, against a party who

Co., 644 A.2d 999, 1001-02 (D.C. 1994).

Additionally, any initial deficiencies in defendants, professional performance were mooted by submission of the amended complaint on November 6, 1998. Plaintiff's expert would evidently agree, Pressman deposition, supra, at 216-222, and his concurrence, along with the timing of the amended pleading, deprives plaintiff of claims based on contentions that defendant Singer wrongly allowed defendant, John M. Craig, to assist in representing plaintiff, wrongly neglected to utilize the resources of Piper, Marbury, Rudnick & Wolfe, LLP, after urging plaintiff to engage that firm, and wrongly denied plaintiff an opportunity to remain as the client of Piper, Marbury, Rudnick Wolfe, LLP, after Singer had left that firm. Such asserted breaches of care, which precede the amended complaint, are pro tanto unavailable to plaintiff as grounds of recovery.

Similarly, plaintiff advances no evidentiary support for its claim that billing errors or discrepancies as to the retainer amount (vis-&-vis extraneous matters and rates not agreed to) amounted to breach of the standard of care or harmed plaintiff's cause against Xerox, Mr. Pressman, again, would agree and would concede that the retainer would, in any event, have been exhausted by legal services properly provided. Pressman deposition, supra, at 77-78 and 80-85. Neither did defendant's inexplicable failure to appear for argument before

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fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Otherwise stated, "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). However the nonmoving party is "entitled to all favorable inferences which may reasonably be drawn from the evidentiary materials." Beard v. Goodyear Tire & Rubber Co., 587 A.2d 195, 198 (D.C. 1991).

the Fourth Circuit furnish, without more, support for plaintiff's claim of malpractice. Nothing supplied by plaintiff indicates that the appellate court's decision would have been otherwise had Mr. Singer appeared and Mr. Pressman, in particular, would not disagree. Pressman deposition, supra, at 338. Nor has plaintiff advanced factual support for its contention that it was not afforded opportunity to stay as the client of defendant Piper, Marbury, Rudnick, & Wolfe, LLP, when defendant Singer dissolved his association with the firm. To the contrary, moreover, shortly after Mr. Singer's announcement of his intention to leave Piper, Marbury, Rudnick & Wolfe, LLP, Mrs. Dyer affirmed, "of course we want to transfer with you." Letter of August 2, 1998 from Tammy A. Dyer to Norman H. Singer at 1, memorandum of law in support of Norman H. Singer's motion for summary judgment, exhibit K. Although plaintiff also attributes actionable significance to defendants' neglecting to file a motion for relief under Federal Rule 60(b) of Civil Procedure, it proffers no evidence, expert or aliunde, to substantiate its claim.

Nor can failure to rely on asserted admissions by Franklin Edmonds, a Xerox agent who testified in the McCune case, be cited as evidence of malpractice. Urging that Mr. Edmonds had admitted at trial that only the signature of a Xerox agent was needed to bind Xerox to the 1997 Agreement, Mr. Pressman would argue. that defendant Singer committed malpractice when he failed to advance "Edwards' trial testimony in either the argument on the amended complaint or Fourth Circuit brief." Pressman deposition, supra, at 46. Yet careful review of the relevant deposition and trial testimony adduced from Edwards in McCune, Supra, reveals that the witness made no admissions beyond conceding the literal wording of the contract. Memorandum of law in support of defendant Norman H. Singer's motion for summary judgment at 34-37. No matter how construed, Mr. Edwards' rather staccato testimony cannot reasonably be understood to constitute the concession that plaintiff here claims he made that and Mr. Pressman would rely on to claim malpractice.

Plaintiff presses the point that it would have survived Xerox's motion to dismiss the amended complaint had it "relied less on the issue of reliance and partial performance, which seems to be the subjects generally of the amended pleading and more on the language of [paragraph] 4.1 [of the 1997 Agreement], which makes a distinction between the existing dealers who had a particular territory and for [them] counter-execution by Xerox was not required." Pressman deposition, supra, at 255-256. Apart from the issue of Mr. Pressman's qualifications as an expert, supra, at 13-16, the criticism seems wholly unavailing as the Fourth Circuit reviewed the 1997 Agreement both in McCune, supra, and in words, supra, and determined that the Agreement would not be binding unless both signatures had executed it. Nothing in the appellate determinations suggests that a stronger or varying emphasis on the document in question would have led to a different appellate ruling in Words, and, as explained, supra, the McCune decision could have no preclusive effect on the case underlying this action. In short, if defendants were unable to rely on the theory of collateral estoppel -- as they were not -- failing to argue it can in no wise be construed as error or malpractice.[10] Plaintiff's last claim, in this respect, is that defendants failed to comprehend the nature of Words' arrangement with Xerox and so never understood the distinction between in-territory sales by Xerox and chargebacks, a practice which evidently could lead to refund of commissions by plaintiff to Xerox if a sale or lease of Xerox equipment were subsequently cancelled by a customer. Plaintiff's contention, however, cannot be sustained in view of the amended pleading which plainly encompasses a claim for losses arising out of chargebacks in 1996. In its amended

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10. On which of two factual bases the McCune jury decided the contract claim for McCune is impossible to decipher. Mr. Pressman would agree that he cannot interpret or reconstruct the jury's "actual analysis," Pressman deposition, supra, at 309, 332-33, and tellingly would admit that he cannot divine the basis of the jury's verdict "by virtue of the interrogatory answers." Pressman deposition, supra, at 337.

complaint plaintiff sought damages for losses which it attributed to Xerox's misconduct and breach of contract and pleaded its cause with adequate specificity at, e.g., ¶¶ 7, 22, 24, 32, and 33 of the amended complaint. Memorandum of law in support of defendant Norman H. Singer's motion for summary judgment, exhibit 16. As a matter of law the amended complaint satisfied Federal Rule 8(a) of Civil Procedure as it manifestly asserts "a short and plain statement of the claim showing that the pleader is entitled to relief." Chargebacks are encompassed within Words, Inc.'s allegation that "[d]uring 1996," Xerox deprived it of "earned commission in excess of $100,000.00," amended complaint, ¶ 22, ¶ 32, and of "certain sales commissions that occurred in 1996, id., ¶ 24, and that" [a]s a direct consequence of this breach of contract, Words has suffered substantial damages." Id, ¶ 33.[11] The second cause of action in the amended complaint asserted breach of the 1996 contract with requisite particularity. It provides no basis for a finding of legal malpractice.

In addition, plaintiff has been unable to identify evidence necessary to establish damages flowing from its 1997 breach of contract claim. Here, too, expert testimony appears to be indispensable in projecting what would have been plaintiff's lost profits. See, e.g., ITT Hartford Group, Inc. v. Virginia Financial Associates, Inc., 258 Va. 193, 520 S.E. 2d 355 (1999); Maher v. Continental Casualty Co., 76 F.3d 535 (4 th Cir. 1996). Yet Mr. Pressman would disavow any opinion as to settlement or verdict amounts in the underlying case. Pressman deposition, supra, at 211-13, memorandum of points and authorities in support of the renewed motion for summary judgment of defendant Jackson & Campbell, P.C., exhibit 10. Karen Parker, also identified by plaintiff as an expert witness, likewise claims no opinion respecting the profitability of Words, Inc., and limits her view, ie., that Words, Inc., would have experienced continued growth during 1997, to her

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11. Notably, Mr. Dyer has identified charge-backs as "the money that was owed." Dyer deposition, supra, at (page 71) 306.

personal experience and to her belief that "based off [sic] their track record there is a very good probability that [continued growth] would happen." Deposition of Karen York Parker of September 10, 2001, at 144, 145; memorandum of points and authorities in support of renewed motion for summary judgment of defendant Jackson Campbell, P.C., supra, exhibit 11. Ms. Parker, however, has no identifiable education or experience that would enable her to conduct the needed market analysis, account for variables, and forecast with reasonable reliability lost profits. While her forecast would, admittedly, be short-range, even its projection for a single year requires a foundation in expertise and in data that the witness appears not to be able to furnish. See Maher v. Continental Casualty Co., supra, ITT Hartford Group. Inc, v. Virginia Financial Associates, Inc., supra.

As to the third and fourth causes of action in the amended complaint which seeks damages for intentional misrepresentation and negligent misrepresentation, no showing, expert or otherwise, has been proffered by plaintiff in support of malpractice. In the absence of such showing, respecting either the filing of the amended complaint or the defense against Xerox's dispositive motion, the Court will enter judgment summarily in defendants, favor. Celotex Corp. v. Catrett, supra; Musa v. Continental Insurance Co., supra.

WHEREFORE, the Court, this 15th day of May, 2002,

ORDERS that the motion of defendant, Jackson & Campbell, P.C., for summary judgment be, and it hereby is, granted; and

FURTHER ORDERS that the renewed motion for summary judgment of defendant, Jackson & Campbell, P.C., be, and it hereby is, granted; and

FURTHER ORDERS that judgment as a matter of law be summarily entered in favor of Jackson &: Campbell, P.C., and against plaintiff; and

FURTHER ORDERS that the motion for summary judgment proximate cause of defendant, Piper, Marbury, Rudnick & Wolfe,

LLP, be, and it hereby is, granted; and

FURTHER ORDERS that judgment as a matter of law be summarily entered in favor of defendant, Piper, Marbury, Rudnick & Wolfe, LLP, and against plaintiff; and

FURTHER ORDERS that defendant Piper, Marbury, Rudnick, Wolfe, LLP's, motion for summary judgment for failure to prove negligence be, and it hereby is, denied as moot; and

FURTHER ORDERS that defendant Norman H. Singer's motion for summary judgment be, and it hereby is, granted; and

FURTHER ORDERS that judgment as a matter of law be summarily entered in favor of defendant, Norman H. Singer, and against plaintiff; and

FURTHER ORDERS that defendant Piper, Marbury, Rudnick Wolfe, LLP's, motion to adopt motions for summary judgment filed by co-defendants be, and it hereby is, granted; and

FURTHER ORDERS that plaintiff's motion for summary judgment be, and it hereby is, denied; and

FURTHER ORDERS that the motion of all parties to continue the January 29, 2002, multi-door mediation be, and it hereby is, denied as moot; and

FURTHER ORDERS that defendant John M. Craig's motion for summary judgment by joinder be, and it hereby is, granted; and

FURTHER ORDERS that judgment as a matter of law be summarily entered in favor of defendant, John M. Craig and against plaintiff; and

FURTHER ORDERS that the motion of defendant John M. Craig to dismiss for lack of personal jurisdiction be, and it hereby is, denied as moot; and

FURTHER ORDERS that the motion of defendant Norman H. Singer to dismiss for lack of personal jurisdiction and to quash

service of process be, and it hereby is, denied as moot; and

FURTHER ORDERS that the cross-claim of defendant Jackson Campbell, P.C., against defendant, Norman H. Singer be, and it hereby is, dismissed as moot; and

FURTHER ORDERS that the motion of defendant Norman H. Singer to dismiss the cross-claim of defendant Jackson & Campbell, P.C., for lack of personal jurisdiction and for failure to state a claim be, and it hereby is, denied as moot; and

FURTHER ORDERS that the motion of defendant Singer Associates, P.C., for summary judgment be, and it hereby is, granted; and

FURTHER ORDERS that judgment as a matter of law be entered summarily in favor of defendant, Singer & Associates, P.C., and against plaintiff; and

FURTHER ORDERS that defendants' motion to strike plaintiff's post hearing submission be, and it hereby is, denied.

John H. Bayly, Jr.
Judge

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

WORDS, INCORPORATED,
Plaintiff

CIV. NO. 00-05875

V.

PIPER MARBURY RUDNICK WOLFE, NORMAN SINGER, ET AL.
Defendants

PLAINTIFF'S RULE 59(e) MOTION TO ALTER AND AMEND JUDGMENT AND TO CORRECT SUMMARY JUDGMENT RECORD PURSUANT TO RULE 60(a)

Pursuant to Rule 59(e), plaintiff moves the Court to both alter and amend the May 15, 2002 Order granting summary judgment to defendants and to permit supplementation of the record as follows. This Motion does not require securing consent from opposing parties.

1. Plaintiff respectfully requests the Court, Judge John H. Bayly, Jr., to document for the record the reasons for and nature of any apparent ex parte telephone communications by the Court to Attorney David B. Durbin, counsel for then-defendant Jackson & Campbell, P.C.. These apparent ex parte communications occurred in August 2001 and March 2002. Plaintiff's counsel is not presently suggesting that any such ex parte communications implicate Judicial Code of Conduct Cannon 3(B)(7) or Superior Court Rule 63-I. Plaintiff's counsel cannot, however, turn away his *client's* demand that these apparent ex parte communications be documented for the record.

2. The 1996 compensation issue may well be appealed and

requires a record clarification. Rule 60(a) permits corrections of the record for appeal purposes where the record is presently incomplete owing to oversight or omission. See also D.C. Court of Appeals Rule 10(e) as to initiating modification or correction of the record at the trial court level. There is good cause for a record clarification. Plaintiff's Motion for Summary Judgment Exhibit 18 was a ten page-excerpt of an (August 2001) 135-page compilation "Itemization" spreadsheet of 1996 compensation allegedly owed Words, Inc. by Xerox Corporation but not sufficiently litigated for by the defendant attorneys then representing Words, Inc.. The 135-page Itemization uses a first column reference to "Page Number," which refers to and incorporates specified parts of an over 1,500 page set of monthly Sales Agent Summary Reports and Incentive Compensation Summaries provided by Xerox Corporation to Words, Inc. in 1996. The Itemization package was created in August 2001 and served on all the present defendants.

The bulky Sales Agent Summary Reports and Incentive Compensation Reports for 1996 were reviewed by the defendant attorneys representing Words, Inc. in 1998, and were made also available by plaintiff in this current litigation for inspection and copying to the negligence defendants in 2001. Only defendant Piper Rudnick and third-party defendant James Brincefield, however, copied these voluminous documents. Present counsel for defendant Norman Singer, William Ryan and Howard Feldman of Whiteford, Taylor, and Preston, entered the case well after the Sales Agent Summary Reports and Incentive Compensation Summaries were made available for inspection and copying.

On appeal, Plaintiff deserves the right to make meaningful reference to these case-within-the-case backup documents to plaintiff's summary judgment exhibit 18, all of which have been amply noticed to the defendants and are referenced in and incorporated by present record documents. The purpose of Rule 60(a) is to promote a fair appeal on a complete record, and this purpose is accordingly served by

designation now of the complete, 135-page Itemization as part of the record in this case, along with the voluminous supporting Sales Agent Summary Reports and Incentive Compensation Summaries in 1996 monthly formats. Pursuant to D.C. Court of Appeals Rule 11(b), plaintiff will propose that just one set of these bulky record documents be provided to the Court of Appeals during record transmittal. A complete copy of the 135-page (August 2001) Itemization and the supporting (1996) monthly Sales Agent Summary Reports and Incentive Compensation Summaries has been delivered to Chambers this day. A proposed Order noting this correction of the record is attached.

Respectfully submitted,

John S. Lopatto III, D.C. Bar 965426; VSB #33980
1800 K St., N.W., Suite 300
Washington, D.C. 20006-2202
202-861-5800
Attorney for Plaintiff

[Certificate of Service and Filing: May 30, 2002]

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

WORDS, INCORPORATED,
PLAINTIFF

CIV. NO. 00-05875

V.

PIPER MARBURY RUDNICK WOLFE, NORMAN SINGER, ET AL.
DEFENDANTS

[PROPOSED]
ORDER CORRECTING RECORD FOR APPEAL

Having considered the Plaintiff's Rule 59(e) and Rule 60(a) motion to correct and supplement the record with respect to certain documents excerpted and referred to in the present summary judgment exhibits, and considering any opposition by defendants thereto, and noting the authority for record clarification expressed by the District of Columbia Court of Appeals in its Rule 10(e), the Court hereby **ORDERS** that plaintiff's motion for record correction is granted as follows:

1. The (August 2001 prepared) 135 page "Words, Incorporated 1996 and January 1997 Itemization of Revenue, Chargebacks and Commissions recorded by Xerox Corporation and Compensation Claimed by Words, Incorporated Against Xerox Corporation", excerpts of which were contained in Plaintiff's Motion for Summary Judgment Exhibit No. 18, is deemed part of the record;

2. The 1996, monthly Sales Agent Summary Reports and Incentive Compensation Summaries supplied by Xerox Corporation to Words, Incorporated, and referred to in Plaintiff's Motion for Summary Judgment Exhibit No. 18, is deemed part of the record.

3. These two sets of additional record material have been provided to chambers in a large moving box, with appropriate caption and labels. This exhibit box shall be delivered to the Clerk for transmittal to the Court of Appeals should any appeal be undertaken.

So Ordered:

_____

Judge John H. Bayly, Jr.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

WORDS, INCORPORATED,
Plaintiff

CIV. NO. 00-CA-05875

V.

PIPER RUDNICK, NORMAN SINGER, ET AL.,
Defendants

PLAINTIFF'S RULE 41(A)(1)(I) NOTICE OF VOLUNTARY DISMISSAL OF FIRST AMENDED COMPLAINT COUNT 2 AND COUNT 3

Owing to plaintiff's desire to appeal as a final order Judge John Bayly's May 15, 2002 grant of summary judgment for all defendants on Count 1 of the original (and First Amended) Complaint, plaintiff Words, Incorporated notes its voluntary dismissal of the First Amended Complaint and Counts 2 and Count 3 pleaded in the First Amended Complaint. Plaintiff's Motion for Leave to File a First

Amended Complaint adding[12] Count 2 and Count 3, is pending and should now be considered moot. This voluntary dismissal of the First Amended Complaint and the two new counts pleaded therein, is made before any defendant has filed an Answer or motion for summary judgment with respect to the new counts 2 and 3 in the First Amended Complaint. Rule 41(a)(1)(i).

Pursuant to Rule 41(a), this voluntary dismissal of Counts 2 and 3 in the First Amended Complaint is without prejudice. Plaintiff may move to re-file the First Amended Complaint with Counts 2 and 3 should any remand of Count 1 occur after appeal.

Respectfully submitted,

John S. Lopatto III, D.C. Bar 965426; VSB #33980
1800 K St., N.W., Suite 300
Washington, D.C. 20006-2202
202-861-5800
Attorney for Plaintiff

[Certificate of Service and Filing: May 30, 2002]

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14. The First Amended Complaint repleads Count 1 from the Original Complaint verbatim. Judge Bayly's May 15, 2002 summary judgment rulings apply to this Count 1 of the original Complaint.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Words, Inc.
v.
Piper, Marbury, Rudnick & Wolfe, L.L.P, Norman Singer, et al.

Civil Action No. 00-5875

ORDER

Before the Court are plaintiff's motion under Superior Court Rule 59(e) of Civil Procedure to alter and amend the judgment and under Superior Court Rule 60(a) of Civil Procedure to correct the record underlying summary judgment, the response and opposition of defendant, Jackson & Campbell, P.C., and the oppositions of defendants, Norman H. Singer, Piper, Marbury, Rudnick & Wolfe, L.L.P., and Singer Associates, P.C.

Also before the Court is a bill of costs submitted by defendant, Jackson & Campbell, P.C., and plaintiff's opposition; a bill of costs submitted by defendant, Norman H. Singer, and plaintiff's opposition; and a bill of costs submitted by defendant, Piper, Marbury, Rudnick & Wolfe, L.L.P., and plaintiff's opposition.

In its motion to alter or amend the judgment and to correct the record, plaintiff seeks to supplement the record by designating as part of the record both a "135-page compilation 'Itemization' spreadsheet of 1996 compensation allegedly owed Words, Inc. by Xerox Corporation but not sufficiently litigated for by the defendant's attorneys then representing Words, Inc.", plaintiff's Rule 59(e) motion to alter and amend judgment and to correct summary judgment record pursuant to Rule 60(a) at 2, and also "an over 1,500 page set of monthly Sales Agent Summary Reports and Incentive

Compensation Summaries provided by Xerox Corporation to Words, Inc., in 1996." Plaintiff's motion, supra, at 2.[13] Plaintiff argues that the "1996 compensation issue may well be appealed and requires a record clarification." Plaintiff's motion, supra, at 2. More specifically, plaintiff contends that it "deserves the right to notice meaningful reference to these case-within-the-case backup documents to plaintiff's summary judgment exhibit 18, all of which have been amply noticed to defendants and are referenced in and incorporated by present record documents." Plaintiff's motion, supra, at 3.

Plaintiff also asks the undersigned judge to "document for the record the reasons for and nature of any apparent ex parte telephone communications by the Court to Attorney David B. Durbin, counsel for then-defendant Jackson & Campbell, P.C." Plaintiff's motion, supra, at 1. Plaintiff asserts that "[t]hese apparent ex parte communications occurred in August 2001 and March 2002" and while plaintiff's counsel does not now suggest that any such ex parte communications implicate Judicial Code of Conduct Canon 3(B)(7) or Superior Court Rule 63-I, plaintiff's counsel represents that plaintiff has "demand[ed] that these apparent ex parte communications be documented for the record." Plaintiff's motion, supra, at 1.

In opposition defendants, Norman H. Singer, Piper, Marbury, Rudnick & Wolfe, L.L.P., and Singer & Associates, P.C., urge that plaintiff now wrongly seeks to have the Court of Appeals "consider documents which were not before this judgment and to correct summary judgment record at 3. Defendants point out, moreover, that Rule 60(a) applies to

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13. Plaintiff has supplied chambers with a "complete copy of the 135-page (August 2001) Itemization and the supporting (1996) monthly Sales Agent Summary Report and Incentive Compensation Summaries." Plaintiff's motion, supra, at 3. Plaintiff proposes that "just one set of these bulky record documents be provided to the Court of Appeals during record transmittal." Id.

clerical mistakes of the Court and is not to be utilized to reverse, change or correct tactical decisions of a litigant." Opposition, supra, at 3. No oversight or omission, argue defendants, has here been cited by plaintiff which ought not to be permitted to advance its appeal by submitting for review documents plaintiff "deliberately determined not submit to this Court." Opposition, supra, at 4. Nor, add defendants, is plaintiff helped by District of Columbia Court of Appeals Rule 10(e) which permits modification or correction of the record so as to conform the appellate record to the trial record. Defendants cite McCoy v. United States, 781 A.2d 765 771-72 (D.C. 2001), and emphasize that "the Court of Appeals review must be limited to what was on file with this Court when it ruled on the parties' dispositive motions." Opposition, supra, at 5 (citation omitted).

When plaintiff sought summary judgment in its favor on what it claimed was an underlying "$160,000 or more damages claim [that] was squandered away by the careless lawyering of the supposedly expert defendant franchise litigation attorneys", plaintiff's points and authorities in support of motion for summary judgment at 27, plaintiff asserted that "[t]he lynchpin of Words 1996 compensation claims was set out in the 140 page Itemization provided to defendants in August 2001," and that "Expert Witness [Karen] Parker validated the methodology in this Itemization, excerpts of which [have been] attached in Exhibit 18, and which proved that Xerox was abusing the commission chargeback procedure by crediting and then reversing commissions to Words, Inc. for sales that Words made in its territories to non-Reserved Account customers." Plaintiff's points and authorities, supra, at 26. Because, plaintiff now reasons, the "1996 compensation issue may well be appealed and requires a record clarification," plaintiff's Rule 59(e) Motion, supra, at 2, "plaintiff deserves the right to make meaningful reference to these case-within-the-case backup documents to plaintiff's summary judgment exhibit 18, all of which have been amply noticed to the defendants and are referenced in and incorporated by present record documents." Plaintiff's Rule

59(e) motion, supra, at 3.

Judgment as a matter of law is to be granted a litigant "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Superior Court Rule 56(c) of Civil Procedure. Where, as here, cross-motions for summary judgment have been urged, the Court must separately consider the submission of each litigant, but is obviously to refer itself to all of the evidentiary materials on file and referred to in Rule 56. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1984). Moreover, upon appeal the Court of Appeals reviews the trial court's decision de novo. E.g., Anderson v. Ford Motor Co., 682 A.2d 651,652 (D.C. 1996). Here, then, the appellate court passes on what was before the trial court so as to determine whether facts were misapprehended or law was misapplied by the lower court. Anderson v. Ford Motor Co., supra, 682 A.2d at 652; Seigel v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 745 A.2d 301, 303 (D.C. 2000). Accordingly, the appellate court may also determine whether factual submissions were wrongly excluded or overlooked. See Celotex Corp. v. Catrett, supra, 477 U.S. at 323.

What this Court ought not to allow, however, is transfer of a different or expanded record to the appellate court and so skew appellate review. Neither Superior Court Rule 59(e) nor 60(a) of Civil Procedure permits the trial court to enlarge a record by subsequent inclusion of material from which a movant has purposely excerpted selected segments (comprising ten pages out of 135 pages referring to an additional 1,500 pages of reports and summaries) so as to permit validation by an expert of the methodology in the underlying documents. Plaintiff's points and authorities, supra, at 26. Experts, of course, commonly summarize their findings and are not required to submit into evidence all of their documentary calculations, references, and research. See

Federal Rule 705 of Evidence. Moreover, as a moving party, plaintiff bore "the initial responsibility of informing the [trial] court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, supra, 477 U.S. at 323.

Because plaintiff, like Ms. Parker in forming her opinion, evidently relied on a ten-page summary in seeking summary judgment and also in opposing defendants' motion for summary judgment[14], the Court will deny plaintiff's motion to enlarge the record by including in it the 135-page document of August 2001, "Words, Incorporated 1996 and January 1997 Itemization of Revenues, Chargebacks and Commissions recorded by Xerox Corporation and Compensation Claimed by Words, Incorporated against Xerox Corporation," and the approximately 1,500 page document, collecting, for 1996, monthly "Sales Agent Summary Reports and Incentive Compensation Summaries." These underlying documents (ad instar voluminis) were not directly relied upon by plaintiff in its dispositive motion nor in its opposition to defendant's dispositive motion. Neither was their significance made known to the Court except, at a considerable remove, as supporting paperwork for plaintiff's expert's conclusions about the reasonableness of plaintiff's damages calculations.

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13. Although plaintiff opposed defendants' motion for summary judgment as to 1996 sales commissions claimed by plaintiff in reliance on commission reports and by reference to "over 1,000 pages of tax returns, sales and commission printouts, and other financial documents showing Words, Inc. 'Xerox" and 'non-Xerox' earnings from 1992 through 1997", plaintiff's opposition to defendants' December 21, 2001 motions for summary judgment at 22-23 (footnote omitted), plaintiff clearly explained in detail in Plaintiff's Motion for Summary Judgment and in consultant Karen Parker's report and deposition excerpts." Id., n. 14.

In response to plaintiff's stated concern about "apparent ex parte telephone communications by the Court to Attorney David B. Durbin, counsel for then-defendant Jackson & Campbell, P.C.," plaintiff's Rule 59(e) motion, supra, at 1, the undersigned judge represents that in August of 2001 he asked counsel for defendant, Jackson & Campbell, P.C., to help arrange for a subsequent status conference by telephone call with counsel for all of the parties. The undersigned judge requested Mr. Durbin's assistance when Mr. Durbin telephoned chambers to inquire about scheduling the telephone conference that was later conducted. Similarly, in March of 2002, the undersigned judge spoke directly by telephone with Mr. Durbin in response to a request to schedule a motions hearing and again asked Mr. Durbin to determine which of several available dates would be convenient for the parties. Neither during the two very brief conversations by telephone, nor at any other time, did the undersigned judge discuss with Mr. Durbin, or with any other counsel to the parties, the merits of the case or the substance of any issue connected with the case, whether pending or resolved. The sole purpose in speaking directly with Mr. Durbin, whom the undersigned judge has known for many years from his appearances in this Court and from his participation in professional and eleemosynary associations, was to accelerate scheduling of the telephone conference and the motion hearing.

Defendants all seek award of costs. Their applications are mostly opposed by plaintiff. Award of costs to a prevailing party under Superior Court Rule 54(d) of Civil Procedure lies within the trial court's discretion. E.g., Kleinman v. Aetna Casualty & Surety Co., 581 A.2d 1263. 1267 (D.C. 1990); Ingber v. Ross, 479 A.2d 1256, 1265 (D.C. 1984). Moreover, court fees and witness fees are those costs which are ordinarily recoverable. E.g., Robinson v. Howard University, 455 A.2d 1363, 1368-69 (D.C. 1983).

In its bill of costs, however, defendant, Jackson & Campbell, P.C., requests filing fees, costs of obtaining

business records necessary to its defense, a witness fee and service of process fee directed to Xerox Corporation, and costs of deposing plaintiff's principal and four additional deponents.

The Court will allow defendant, Jackson & Campbell, P.C., $40 for the filing fee claimed, but will deny all other requested fees and costs. The witness fee, as well as the service of process fee sought by defendant, are unaccompanied by the necessary certificate. Superior Court Rule 54-I(a) of Civil Procedure. Besides, defendant's costs of obtaining and copying business records, like costs of depositions, are not explained individually or with any particularity as to how they were necessarily incurred for preparation of defendant's case, Tally v. Varma, 689 A.2d 547, 556 (D.C. 1997) ("our case law requires that the trial court find that the deposition [and copying] was necessary for case preparation." (citations omitted)). Last, the service of process fee is also unexplained.

Defendant Norman H. Singer also seeks certain filing fees, costs of deposition transcripts and incidental costs, and copying charges. The Court will allow defendant Singer $160 in filing fees, transcript costs for James Dyer ($1,553.20), for Arthur Pressman, plaintiff's expert as to the standard of care ($1,356.31), for Karen Parker, plaintiff's expert as to damages (439.56), costs for teleconferencing of Mr. Pressman's deposition ($87.03), and costs of copying exhibits appended to defendant's motion for summary judgment ($875.70). The Court will deny defendant's other requests for transcripts as their necessity for preparation of defendant's case is not, either in the bill of costs or in defendant's prior submissions, clear or certain. The Court will also further deny defendant's copying charges as excessive, insufficiently explained, possibly resulting from redundancy, and not customary. See, e.g., Farmer v. Arabian American Oil Co., 379 U.S. 227, 275 (1964) ("the discretion...to tax costs charges should be sparingly exercised with reference to expenses not specifically allowed by statute.")

The bill of costs submitted by defendant, Piper, Marbury, Rudnick & Wolfe, L.L.P., will be disallowed except as to filing fees ($120). The remaining costs prayed for are wholly unexplained, e.g., Harris v. Sears Roebuck & Co., 695 A.2d 108 (D.C. 1997), very largely unprecedented, e.g., Tally v. Varma, supra, and clearly excessive. E.g., Farmer v. Arabian-American Oil Co., supra.

Wherefore the Court, this 30 day of August, 2002,

ORDERS that plaintiff's Rule 59(e) motion to alter and amend judgment and to correct summary judgment record pursuant to Rule 60(a) be, and it hereby is, denied; and

FURTHER ORDERS that bill of costs for defendant Jackson & Campbell, P.C., be, and it hereby is, granted and allowed in the amount of $40.00, and, in all other respects, denied; and

FURTHER ORDERS that bill of costs submitted by defendant Norman H. Singer be, and it hereby is, granted and allowed in the amount of $4,471.80; and, in all other respects, denied; and

FURTHER ORDERS that bill of costs for defendant Piper, Marbury, Rudnick & Wolfe, L.L.P., be, and it hereby is, granted and allowed in the amount of $120.00 and in all other respects, denied.

John H. Balyly, Jr.
Judge

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 02-CV-1123

WORDS, INC., APPELLANT,
v.
NORMAN H. SINGER, *et al.*, APPELLEES.

On Motion to Dismiss Appeal from the Superior Court of the District of Columbia (CA-875-00)

(Hon. John H. Bayly, Jr., Trial Judge)

(Decided November 27, 2002)

Howard R. Feldman, *David P. Durbin*, *James P. Ulwick*, *Glenn W. D. Golding*, and *Carlos M. Recio*, were on the motion of appellees to dismiss appeal and the reply memorandum in support thereof.

John S. Lopatto III, was on appellant's opposition to the motion to dismiss.

NEBEKER, *Senior Judge*: This matter presents the question whether a post-judgment motion in Superior Court styled as a "Rule 59 (e)" motion, but seeking no relief available under that Rule, tolls the notice of appeal time period. We hold that it does not and dismiss the appeal as untimely.

Appellant, Words, Inc., filed a legal malpractice action against several firms and individuals, the appellees here. After the trial court granted appellees' motions for summary judgment on May 16, 2002, appellant filed a pleading entitled "Plaintiff's Rule 59 (e) Motion to Alter or Amend Judgment and to Correct Summary Judgment Record Pursuant to Rule 60 (a)." The motion was filed within the ten-day deadline of Super. Ct. Civ. R. 59 (e). In the motion, appellant sought to have the trial record

supplemented with a statement by the trial court explaining certain ex parte communications and with materials to which the parties referred in their motions for summary judgment but that were not attached *in toto* to the motions. After the trial court denied the "Rule 59" motion on August 30, 2002, appellant filed its notice of appeal on September 27, 2002.

Appellees argue that the "Rule 59 (e)" motion was not in fact a motion to alter or amend the judgment and therefore did not toll the time for noting an appeal. For the following reasons, we grant the motion to dismiss.

A Rule 59 (e) motion is one that "seeks relief from alleged legal errors in the trial courts' judgment...." *Vincent v. Anderson*, 621 A.2d 367, 371 (D.C. 1993). Appellant's post-judgment motion asked only for supplementation of the record for the purpose of raising certain issues on appeal. It did not specify any error in the trial court's judgment, nor ask that the judgment be altered or reconsidered. "The nature of a motion is determined by the relief sought, not by its label or caption." *Wallace v. Warehouse Employees Union #730*, 482 A.2d 801, 804 (D.C. 1984). Therefore, the fact that appellant's motion was labeled a Rule 59 (e) motion is not determinative.

Only specific motions toll the time for appeal. D.C. App. R. 4 (a)(2). A motion to supplement the trial record is not among them. Appellant argues that its post-judgment motion qualifies as a tolling motion "to amend or make additional findings of fact." *Id.* The additional findings appellant relies on to so characterize its motion are the trial court's explanation of its ex parte communication with counsel for one of the defendants. Appellant's post-judgment motion asked the trial court to "document for the record the reasons for and nature of any apparent ex parte telephone communications [with defense counsel]." In the order denying appellant's motion, the trial court explained that the telephone calls to counsel were simply to facilitate arranging a status conference and a motions hearing. The

trial court's explanation of the calls is not an additional factual finding. It was not based on any assessment of factual assertions submitted by the parties. Rather, it was an explanation of the trial court's conduct. This explanation did not amend or supplement the trial court's memorandum opinion and order granting summary judgment, which further demonstrates that appellant's "Rule 59" motion was not a motion to amend judgment or make additional findings of fact.

Appellant's suggestion that any motion seeking nonministerial relief tolls the appeal time is contrary to the express language of D.C. App. R. 4 (a)(2). Moreover, appellant's reliance on our longstanding policy against piecemeal appeals is misplaced, since that policy is directed at prohibiting unnecessary interlocutory appeals, see *Medlantic Health Care group. Inc. v. Cunningham*, 755 A.2d 1032, 1033 (D.C. 2000), and is not intended to postpone the time for appealing a final judgment. "Piecemeal review, against which the rule of finality is aimed, is not as decisive a consideration after judgment as before judgment." *Crane v. Crane*, 657 A.2d 312, 316 (D.C. 1995) (quoting *Joseph F. Hughes & Co. v. United Plumbing & Heating Inc.*, 390 F.2d 629, 630 (6th Cir.1968)). The summary judgment order in this case was a final, appealable order, and the nature of appellant's post-judgment motion did not subject the order to modification.

Appellant's post-judgment motion to supplement the record was not one that tolled the appeal time; therefore, the notice of appeal filed more than four months after entry of the judgment is untimely. We lack jurisdiction to consider an appeal that is not timely filed. *Circle Liquors, Inc. v. Cohen*, 670 A.2d 381 (D.C. 1996). Accordingly, we grant appellees' motion to dismiss this appeal.

So ordered.

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 02-CV-1123
WORDS, INC.,
Appellant,

CA5875-00

v.

NORMAN H. SINGER,
ET AL.,
Appellees

ORDER [February 28, 2003]

On consideration of appellant's petition for rehearing en banc, and appellant's motion to invoke appeal jurisdiction, the opposition and the reply thereto, it is

ORDERED by the merits division that the petition for rehearing and the motion to invoke appeal jurisdiction are denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 02-CV-1123
WORDS, INC.,

Appellant,

CA5875-00

v.

NORMAN H. SINGER,
ET AL.,

Appellees

ORDER [June 26, 2003]

On consideration of appellant's petition for rehearing or rehearing en banc, and appellant's letter pursuant to D.C. App. R. 28(k), it is

ORDERED by the merits division that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM